STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF TRANSPORTATION

In the Matter of the MnDOT Detroit Lakes Regional Headquarters, Construction Project Number 00TZ1791B

RECOMMENDATION ON MOTION FOR SUMMARY DISPOSITION

The above-entitled matter came before Administrative Law Judge Eric L. Lipman on Comstock Construction, Inc.'s ("Comstock") motion for summary disposition. Comstock filed its motion on September 21, 2007. The Minnesota Department of Transportation ("MnDOT") filed a response memorandum in opposition to the motion for summary disposition on October 8, 2007, and Comstock filed a reply memorandum on October 15, 2007. Based upon a stipulation by the parties, oral argument was held on January 10, 2008.

Thomas R. Revnew and Michael L. McCain, Attorneys at Law, Seaton, Beck & Peters, P.A., 7300 Metro Boulevard, Suite 500, Minneapolis, MN 55439, represented Comstock Construction. Michael A. Sindt, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota, 55101, represented MnDOT.

STATEMENT OF ISSUES

1. Is Comstock entitled to summary disposition on the Department's claims for additional wages because those claims are barred by the doctrine of laches?

2. Is Comstock entitled to summary disposition on the Department's claims for additional wages because the labor classification determinations at issue were not based upon the *U.S. Department of Labor Dictionary of Occupational Titles*?

3. Is Comstock entitled to summary disposition on the Department's claims for additional wages because the labor classification determinations at issue operate as unpromulgated rules?

4. Is Comstock entitled to summary disposition on the Department's claims for additional wages because the labor classifications at issue are so indefinite as to deny state contractors due process of law?

FACTUAL BACKGROUND

Based upon the filing of the parties, the following facts are not genuinely disputed:

1. On or about August 17, 2000, Comstock and MnDOT entered into a contract that involved adding onto and remodeling MnDOT's Detroit Lakes District Headquarters. The contract required Comstock to pay employees who worked on the project prevailing wages that were consistent with Minn. Stat. §§ 177.41 through 177.44.

2. Under the terms of the MnDOT – Comstock contract, Comstock was required to submit certified payroll reports to MnDOT, and to make certified payroll records available within three business days, if so requested by MnDOT officials. The payroll records were to contain, among other things, the employee's name, applicable classification code(s) under the prevailing wage law, hourly wage rates, and daily and weekly hours worked in each classification.

3. Comstock began construction on the project on or about September 5, 2000. Kevin Koppang, Comstock's Project Manager on the Detroit Lakes project, was responsible for determining the prevailing wage classifications for work performed by Comstock employees.[1] On a weekly basis, Koppang reviewed the employee timecards and assigned what he believed to be the appropriate three-digit prevailing wage classification code to the work that was performed. Employees were then paid the prevailing wage based on the work they performed, and Comstock submitted a weekly certified payroll report to MnDOT.[2]

4. On September 17, 2001, after more than a year of contract performance, Roxanne Farnham, a Senior Labor Investigator with MnDOT, sent a letter to Comstock. Farnham notified the firm that the documentation it had submitted to date indicated that the firm was in compliance with the prevailing wage law.[3] Based upon this assessment, Comstock officials continued to classify and pay its employees as it had since the beginning of the contract.[4]

5. On or about October 31, 2001, MnDOT received a prevailing wage complaint from a Comstock employee. MnDOT notified Comstock of the complaint on or about February 19, 2002, and proceeded to conduct an investigation.

6. On or about March 1, 2002, Comstock completed its performance under the contract.

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[1] Koppang Affidavit, at 3.

[2] Koppang Aff. at 5.

[3] Farnham Deposition at 18, 63-64; Ex. 1.

[4] Koppang Aff. at 6.

7. On a number of occasions in 2002 and 2003, Mr. Koppang asked Ms. Farnham to identify the specific claimed prevailing wage law violations – namely, which tasks had been improperly classified by the firm. Ms. Farnham did not provide Comstock with additional detail on the alleged violations until September of 2003.[5]

8. In a letter dated October 14, 2003, Ms. Farnham directed Comstock to either: (a) submit all of its cancelled employee paychecks, check ledgers and employee timekeeping records for each employee to the Department, or (b) "conduct a self audit" and submit the results for her review.[6]

9. Between the two alternatives, Comstock chose to conduct a self-audit. During this process, Comstock officials reviewed employee timecards, daily reports and payroll reports for all of the employees who worked on the Detroit Lakes Project.[7] While conducting the self-audit, Comstock asked Farnham for a list of claimed violations along with a list of governing labor classifications. Comstock sought to use the official materials in completing its audit.[8] On November 12, 2003, Ms. Farnham responded to Comstock's request by stating that she would fax to Comstock a compilation of classification determinations received by MnDOT from the Department of Labor and Industry (DOLI). Ms. Farnham cautioned, however, that the determinations she was transmitting were not either a statute or a rule, and should only be used "for reference" by the firm.[9]

10. Whenever she is uncertain as to how to classify a particular task in the construction industry, it is Ms. Farnham's practice to seek written clarification from Eric Oelker as to the proper trade classification.[10] Mr. Oelker is a Senior Labor Investigator at DOLI and is responsible for making labor classification determinations for the State of Minnesota.[11]

11. Ms. Farnham retains Mr. Oelker's writings (and earlier classification determinations) in a file and uses these materials when enforcing the prevailing wage laws against state contractors.[12] For example, pointing to Mr. Oelker's 2003 determination that installing Venetian Blinds was properly categorized as carpentry work, Ms. Farnham asserted that Comstock likewise was to pay the workers it hired to install blinds the prevailing wage for carpenters.[13]

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[5] Farnham Deposition at 111-115; Ex. 6; Koppang Aff. at 10.

[6] Farnham Deposition at 117; Ex. 9.

[7] Farnham Deposition at 118.

[8] Farnham Deposition at 118; Exs. 10 and 11.

[9] Farnham Deposition at 122-124; Ex. 13.

[10] Farnham Deposition at 53-61 and 159-60; *see also,* Farnham Affidavit, Ex. D

[11] Oelker Deposition at 87.

[12] Farnham Deposition at 53-61.

[13] Farnham Deposition, Ex. 13.

12. In June 2004, Comstock completed the "self-audit" and forwarded the results to Ms. Farnham.[14]

13. In December 2004, Ms. Farnham requested additional timekeeping and payroll documentation from Comstock.[15] MnDOT's requests for additional information continued over the succeeding months. In May of 2005, some three years after completion of the Detroit Lakes project, Ms. Farnham continued to submit questions to Mr. Koppang regarding Comstock's classification of specific tasks and how certain equipment was used on the project.[16]

14. On June 21, 2005, Ms. Farnham provided Comstock with what she termed a "final" determination. The determination stated that, as a result of a series of prevailing wage violations, Comstock owed $113,138.88 in additional wages.[17]

15. Notwithstanding the June 21, 2005 determination, however, Ms. Farnham continued to ask Mr. Oelker of DOLI for further clarification of the appropriate labor classifications for project-related work. In October of 2005, Ms. Farnham met with Mr. Oelker to discuss the appropriate labor classifications for the work of 30 different Comstock employees.[18]

16. On April 3, 2006, Ms. Farnham issued another determination as to the amount of prevailing wages owed by Comstock. In this determination, MnDOT asserted that Comstock owed $109,561 in additional wages for prevailing wage violations.[19]

17. On August 10, 2006, Ms. Farnham issued yet a third determination as to the amount of prevailing wages owed by Comstock. This third determination remains MnDOT's current position in the litigation. It claims that Comstock owes $111,428.11 in additional wages for prevailing wage violations.[20]

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[14] Bowman Affidavit, at ¶ 5.

[15] Farnham Deposition at 137; Ex. 22.

[16] Farnham Deposition at 139-140; Ex. 24.

[17] Farnham Deposition at 156-58; Ex. 27.

[18] Farnham Deposition at 157-159; Ex. 28.

[19] Koppang Aff., Ex. 2.

[20] Farnham Deposition at 172; Ex. 34. Comstock notes in its Memorandum that during a June 20, 2007 deposition, Ms. Farnham asserted that, in fact, $114,065.47 is owed by the firm. This number is greater than the sum demand in its Notice of and Order for Hearing. *Compare, Comstock's Memorandum in Support of Summary Disposition*, at 23 *with* Notice of and Order for Hearing, at 3.

18. On October 10, 2006, Comstock requested a contested case hearing as to these claims.[21] The Notice and Order for Hearing was issued by MnDOT on December 4, 2006.[22]

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Transportation have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50 and 177.44, subd. 7.

2. The Notice of Hearing is proper in all respects and the Department complied with all substantive and procedural requirements of law and rule.

3. The Minnesota Prevailing Wage Law is a minimum wage law that applies to construction projects financed in whole or in part by state funds. Its purpose is to ensure that those who work on such projects are paid wages comparable to wages paid for similar work in the community.[23]

4. The Minnesota Prevailing Wage law is codified at Minn. Stat. §§ 177.41 - 177.44. The accompanying administrative rules are set forth at Minn. R. 5200.1000 - 5200.1120. Together, the statutes and the rules govern the determination, certification, and payment of prevailing wages to laborers, workers and mechanics working on state-funded construction projects.

5. Under the Minnesota Prevailing Wage Law, DOLI establishes the labor classifications for workers and determines the prevailing wage rate for the classifications.[24] Prevailing wage rates are determined by DOLI following a review of wage surveys that it compiles for each of ten defined areas of the state. As required by Minn. Stat. § 177.44, subd. 6, and Minn. R. 5200.1060, the prevailing wage rate is the surveyed rate paid to the largest number of workers engaged in the same class of labor within these areas.

6. Minn. R. 5200.1040 governs the determination of labor classifications for purposes of the Prevailing Wage law. It provides that each class of labor must be based upon:

> the particular nature of the work performed with consideration given to those trades, occupations, skills, or work generally considered within the construction industry as constituting distinct classes of labor.

7. Minn. R. 5200.1040 further provides that in determining classes of labor, the Department of Labor and Industry must consider:

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[21] Notice of and Order for Hearing, at 3.

[22] *Id.,* at 5.

[23] Minn. Stat. § 177.41.

[24] Minn. Stat. § 177.44, subds. 3 and 4.

> work classifications contained in collective bargaining agreements, apprenticeship agreements on file with the department, the United States Department of Labor Dictionary of Occupational Titles, and customs and usage applicable to the construction industry.[25]

8. Additionally, Minn. R. 5200.1100 lists the master job classifications and provides contractors with the codes to use in classifying work. Codes for various classifications of laborers, power equipment operators, truck drivers, and special craftsmen are listed – with over 140 distinct categories of work listed in the regulation.

9. While MnDOT has neither a policy or rate-setting role under the prevailing wage laws, it does have a role in enforcing these requirements. The Commissioner of Transportation is authorized by state law to "require adherence" to the provisions of the state prevailing wage laws from those with whom it contracts.[26]

10. The consequences – in terms of corporate reputation, profitability and opportunity for future work – can be severe if a state contractor does not abide by the Prevailing Wage Act. These consequences may include misdemeanor criminal sanctions (including imprisonment) and a $300 fine. Moreover, "[e]ach day that the violation continues is a separate offense."[27] Lastly, the Department may preemptively reject the bids and proposals of any contractor that has a history of noncompliance with the prevailing wage laws.[28]

11. While MnDOT had shifting and uncertain demands for recovery, Comstock was keenly aware that some amount of additional wages was sought by the agency. Comstock was in a position to preserve its defenses and evidence for a later hearing, and was not unduly prejudiced by MnDOT's admittedly slow progress in settling upon a specific amount to demand for recovery.

12. Likewise MnDOT, when making demands for additional wages, was not pursuing payments for its own benefit or account. Instead, MnDOT's demands arise out of a regulatory enforcement role – presumably, on behalf of those workers whom it claims were underpaid. Because MnDOT is performing a governmental function when making claims that, under the Prevailing Wage Act, certain workers should have been paid more, application of the defense of laches is not appropriate.

13. Minn. R. 5200.1040 (E) requires that in "determining particular classes of labor, the department shall consider work classifications contained in collective bargaining agreements, apprenticeship agreements on file with the department, the '*United States Department of Labor Dictionary of Occupational Titles*,' and customs and usage applicable to the construction industry."

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[25] Minn. Rule 52001040 (E).

[26] Minn. Stat. § 177.44, subd. 7.

[27] Minn. Stat. § 177.44, subd. 6.

[28] Minn. Stat. § 161.32, subd. 1d.

14. While there is strong evidence in this record that Mr. Oelker, and DOLI, entirely failed to consider the provisions of the *U.S. Department of Labor Dictionary of Occupational Titles* when making labor classifications for the Detroit Lakes project, as required by Minn. R. 5200.1040 (E),[29] the deposition testimony of Mr. Oelker is simply too oblique to conclude that Comstock is entitled to disposition as a matter of law. Comstock's defense that the labor classifications for its contract were established without use of the required materials is not clearly established.

15. A case-by-case adjudication seeks to apply an extrinsic source of law – either a statute or a regulation – to the facts of a particular case.

16. If the agency seeks to establish a more general proposition, not found in existing statutes or regulations, which the agency will apply in future cases, the agency must undertake rulemaking under the Minnesota Administrative Procedure Act (MAPA).

17. In this case, Comstock has established that DOLI's past labor classification determinations meet the definition of a rule under Minn. Stat. § 14.02, subd. 4. MnDOT's application of these determinations in assigning classification codes amounts to unauthorized rulemaking and Comstock is entitled to summary disposition upon this defense.

18. Under both the state and federal constitutions, administrative rules must meet certain due process standards of definiteness.[30] A rule is void for vagueness if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or fails to provide sufficient standards for enforcement by executive branch officials.[31]

19. Because Administrative Law Judges and agency heads are charged with ensuring that laws, rules and ordinances are applied in a constitutional manner, it is permissible for these officials to consider whether application of a statute or rule, in a particular factual setting, meets the constitutional standards that have been announced by our courts.[32]

20. In this case, not only do the classification categories fail to give a person of ordinary intelligence a reasonable opportunity to know which designations are

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[29] Oelker Deposition, at 35-36, 41-47.

[30] *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 107 (Minn. App.), *review denied* (Minn. 1991).

[31] *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *In re N.P.*, 361 N.W.2d 386, 394 (Minn. 1985) *appeal dismissed* 474 U.S. 976 (1985).

[32] *See, Pine County v. State Dep't. of Natural Resources*, 280 N.W.2d 625, 629 (Minn. 1979) ("If ... the challenge relates only to the constitutionality of the ordinance, as applied, the aggrieved party must first exhaust available remedies before we will consider the constitutional claims ripe for our review") (citing *State Dept. of Nat. Resources v. Olson*, 275 N.W.2d 585 (Minn. 1979)); *Minnesota Educ. Ass'n v. Minnesota State Bd. of Educ.*, 499 N.W.2d 846, 849 (Minn. App. 1993) ("in a pre-enforcement constitutional challenge, the challenge is to the constitutionality of the rule on its face; in a contested enforcement action, the challenge is more to the constitutionality of the rule as applied").

prohibited, the regulations fail to provide sufficient standards for later enforcement by the agency. Because the prevailing wage classification rules do not include sufficient language for readers to determine its intended scope, they may not form the basis for a monetary claim by MnDOT against Comstock.[33]

21. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

22. The Memorandum that follows explains the reasons for these Conclusions, and the Administrative Law Judge therefore incorporates that Memorandum into these Conclusions.

Based upon these Conclusions, the written submissions of the parties, the affidavits and other documents filed in this matter, and the argument of counsel, the Administrative Law Judge makes the following:

RECOMMENDATION

(1) The Commissioner should GRANT-IN-PART and DENY-IN-PART Comstock's Motion for Summary Disposition.

(2) The Commissioner should DISMISS the Notice and Order for Hearing in this matter.

Date: February 7, 2008.

s/Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Transportation will make the final decision after a review of the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Carol Molnau, Commissioner of Transportation, 395 John Ireland Boulevard, Mailstop 100, St. Paul, Minnesota 55155-

[33] *See, Dep't. of Labor and Industry v. CBI Na-Con, Inc.,* OAH Docket No. 12-1901-12038-2 (2002) (http://www.oah.state.mn.us/aljBase/190112038.sd.smm.htm) (Because it was not clear whether the Department's definition of "confined spaces" was discretionary, or prohibitive, the Administrative Law Judge found the rule void for vagueness).

1899, (651) 366-4800, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Pursuant to Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

The Notice of and Order for Hearing alleges that Comstock committed violations of Minnesota's Prevailing Wage Law while it was under contract with the State to perform remodeling and construction work on MnDOT's regional headquarters in Detroit Lakes (the "Detroit Lakes project"). Comstock maintains that it properly classified and appropriately paid its workers, and it requests dismissal of MnDOT's claims. Comstock argues that the claims are based upon: (1) rights to recovery that are barred by the doctrine of laches; (2) arbitrary and capricious government actions; (3) unauthorized rulemaking by MnDOT or the Minnesota Department of Labor and Industry ("DOLI") and (4) unconstitutionally vague rules.

Summary Disposition Standards

Comstock has moved for summary disposition on the claim that it owes $114,065.47 in past-due wages. Summary disposition is the administrative equivalent of summary judgment.[34] Summary disposition is appropriate when there is no genuine dispute as to the material facts of a contested case and one party necessarily prevails when the law is applied to those undisputed facts.[35]

The moving party carries the burden of proof and persuasion to establish that there are no genuine issues of material fact which would preclude disposition of the case as a matter of law.[36] Further, when considering a motion for summary disposition, the tribunal must view the facts in the light most favorable to the non-moving party.[37]

With that said, however, the party seeking to avoid summary disposition must detail how and where material disputes exist. As Justice Rehnquist once famously observed as to the Federal Rule providing for summary judgment:

> The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action . . . .' Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate

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[34] *See, Pietsch v. Mn. Bd. of Chiropractic Examiners*, 683 N.W.2d 303, 306 (Minn. 2004).

[35] *See, Sauter v. Sauter,* 70 N.W. 2d 351, 353 (Minn. 1955); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1988).

[36] *See, Theile v. Stich*, 425 N.W. 2d 580, 583 (Minn. 1988).

[37] *See, id; Ostendorf v. Kenyon,* 347 N.W.2d 834, 836 (Minn. App. 1984).

> in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.[38]

Because summary disposition is not a "disfavored procedural shortcut," but rather an integral part of our rules, the party opposing the motion may not simply rely upon general statements or allegations that material disputes exist. Rather, in order to defeat an otherwise proper motion for summary disposition, the non-moving party must show the existence of material facts that are genuinely disputed.[39]

Comstock's Arguments in Support of its Motion for Summary Disposition

(1) Laches

Comstock argues that MnDOT's claims for payment of additional wages should be barred by the equitable doctrine of laches.

The equitable doctrine of laches is available to prevent one who has not been diligent in asserting known rights from later recovering against a party who is prejudiced by the delay in asserting claims for recovery.[40] The state courts employ a four-factor test when assessing the defense of laches. The courts consider: (1) the nature of the action and the availability of defenses to the asserted claims; (2) the reasons for the delay in asserting claims for recovery; (3) prejudice to the defending party; and (4) policy implications that might follow from either permitting or barring the claims.[41] Laches is a doctrine that promotes a peaceful society by discouraging the assertion of stale claims for relief.[42]

Comstock maintains that MnDOT's delay in investigating and pursuing claims for additional wage payments has been unreasonable and has unduly prejudiced its defense of those claims. Comstock contends that many of the employees who worked on the Detroit Lakes project are no longer employed by the company; including the contract administrator whose duty it was to provide compliance information and payroll reports to Investigator Farnham.[43] Further, noting that this Office has previously found that a delay of nearly five years before an agency began its formal investigation, was

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[38] *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986).

[39] *See, Murphy v. Country House, Inc*., 240 N.W. 2d 507, 511-12 (Minn. 1976); *Borom v. City of St. Paul*, 184 N.W.2d 595, 597 (Minn. 1971).

[40] *Winters v. Kiffmeyer*, 650 N.W.2d 167, 169 (Minn. 2002) (quoting *Aronovitch v. Levy*, 56 N.W.2d 570, 574 (Minn. 1953)); *Harr v. City of Edina*, 541 N.W.2d 603, 606 (Minn. App. 1996) (quoting *Fetsch v. Holm*, 52 N.W.2d 113, 115 (Minn. 1952)).

[41] *M.A.D. v. P.R.,* 277 N.W.2d 27, 29 (Minn. 1979).

[42] *Id*.

[43] Koppang Aff. at 21.

unreasonable,[44] Comstock argues that an order barring MnDOT's recovery of additional wages is appropriate in this case.

Comstock's laches defense falters on two scores. First, it would not be accurate to state that MnDOT delayed in undertaking the prevailing wage investigation in this case for a period of five years. A more complete description is that the investigation itself, begun while contract performance was underway, continued for a very long time. Accordingly, while the policy of preventing the assertion of stale claims is a strong one, the dispute over the amounts that were due was initiated at an early point by MnDOT, continued to be the subject of communications between the parties and never was abandoned by the agency. Further, while MnDOT's shifting and uncertain demands for recovery invites other hazards, which are addressed below, Comstock was keenly aware that some amount of additional wages was sought by the agency. Accordingly, Comstock was in a position to preserve its defenses and evidence for a later hearing, and was not unduly prejudiced by MnDOT's admittedly slow progress in settling upon a specific amount to demand for recovery.

Second, and likewise problematic for Comstock, the doctrine of laches has ordinarily been applied against state agencies only in those cases where the agency – like a private party in the marketplace – was acting in a proprietary capacity. Indeed, in *Leisure Hills v. Minnesota Department of Human Services*,[45] the Minnesota Court of Appeals held that the doctrine of laches was not available to prevent the Department of Human Services from recouping payments that an earlier government audit noted were then due and owing. As the Court reasoned, when administering the Medical Assistance program – which included efforts to recoup payments from health care providers – the agency was undertaking functions in the state's sovereign capacity. In such circumstances, the defense of laches does not lie.[46]

While it is true that the obligation to pay prevailing wages is, in this case, grounded in the terms of a state construction contract,[47] MnDOT, in making demands for additional wages is not pursuing payments for its own account. Instead, MnDOT's demands arise out of a regulatory enforcement role – on behalf of those workers whom it claims were underpaid.[48] Because MnDOT is performing a governmental function when making claims that, under the Prevailing Wage Act, certain workers should have been paid more, the holding in *Leisure Hills* prevents application of the doctrine of laches. Comstock is not entitled to summary disposition on this defense to the agency's claims.

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[44] *See, Department of Human Rights v. Cold Spring Granite*, OAH Docket No. 4-1700-863-2 (1986) (http://www.oah.state.mn.us/aljBase/1700863.86.htm).

[45] 480 N.W.2d 149 (Minn. App. 1992).

[46] *Id,* at 151; *see also, State v. Brooks*, 236 N.W. 316, 317 (Minn. 1931) ("The collection of taxes is a governmental or sovereign function of the state, and procrastination or delay on the part of its officers in the discharge of such function is not permitted to prejudice the state's right").

[47] Farnham Deposition, Ex. 26 – Contract No. 425783, Section 810, ¶ 1.24 (A)(1) and (B)(5).

[48] *Compare, e.g.,* Notice of and Order for Hearing, at 2-4.

(2) Arbitrary and Capricious Government Action

Comstock likewise argues that MnDOT's claims are without a legal basis because the labor classification determinations upon which MnDOT relies were made in violation of existing rules.

As noted above, Minn. R. 5200.1040 (E) requires that in

> determining particular classes of labor, the department shall consider work classifications contained in collective bargaining agreements, apprenticeship agreements on file with the department, the United States Department of Labor Dictionary of Occupational Titles, and customs and usage applicable to the construction industry.

Comstock asserts that the Department of Labor and Industry based the classifications *solely* on the union contracts and apprenticeship standards and that it failed to consider either the *U.S. Department of Labor Dictionary of Occupational Titles* or the customs and usages of contractors in the Detroit Lakes area, when determining whether a task falls within a particular labor classification.[49] As a result, Comstock argues that the DOLI classification determinations violate the applicable rule and may not lead to a later recovery.[50]

By way of reply, MnDOT asserts that DOLI need not consider each source of guidance before it can render a valid determination of labor classifications.[51]

Under the Minnesota Administrative Procedures Act, a key inquiry is whether the agency's decision represents a reasonable judgment under the circumstances and not merely the exercise of will.[52] So long as an agency engaged in reasoned decision-making, reviewing tribunals will affirm the agency's determination – even in those cases where the reviewing judges might have reached a different conclusion, had they been the decision-maker in the first instance.[53] In this way, the "arbitrary and capricious" standard incorporates a high degree of deference toward agency determinations; with the tribunal declining to substitute its own judgments for those entities that work under a specific delegation of authority from the Legislature.[54]

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[49] *See, Comstock's Memorandum in Support of Summary Disposition*, at 18-19.

[50] *Id*.

[51] *See, MnDOT's Memorandum in Opposition to the Motion for Summary Disposition*, at 12.

[52] *See, Markwardt v. Water Resources Bd.*, 254 N.W.2d 371, 374-75 (Minn. 1977); *People's Natural Gas Co. v. Minnesota Pub. Utils. Comm'n*, 342 N.W.2d 348, 353 (Minn. App. 1983).

[53] *Cable Communications Bd. v. Nor-West Cable Communications Partnership*, 356 N.W.2d 658, 668-69 (Minn. 1984).

[54] *See, In the Matter of Rochester Ambulance Serv.*, 500 N.W.2d 495, 499 (Minn. App. 1993); *Town of Forest Lake v. Minnesota Mun. Bd.*, 497 N.W.2d 289, 291 (Minn. App.) *rev. denied* (Minn. 1993).

An agency fails to undertake reasoned decision-making when it:

> relied on factors which the legislature had not intended it to consider, *if it entirely failed to consider an important aspect of the problem*, if it offered an explanation for the decision that runs counter to the evidence or if the decision is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[55]

While there is strong evidence in this record that Mr. Oelker, and DOLI, entirely failed to consider the provisions of the *U.S. Department of Labor Dictionary of Occupational Titles* when making labor classifications for the Detroit Lakes project, as required by Minn. R. 5200.1040 (E), the deposition testimony of Mr. Oelker is simply too oblique on this point to conclude that Comstock is entitled to disposition as a matter of law. While Mr. Oelker concedes that he has not referred to the *Dictionary of Occupational Titles* in "probably two or three years;" Comstock's defense that the labor classifications for its contract were established without use of the *Dictionary* is only hinted at, but not clearly established.[56]

Similarly, it is not clear either from the text of the regulation, or other materials relied upon by Comstock, that the regulatory phrase "customs and usage applicable to the construction industry" is limited to a geographic area adjacent to the project site. While this might be a reasonable inference under the circumstance, it is not the only reasonable inference one could draw from the regulation or the current record.

Accordingly, notwithstanding the strength of Comstock's proof to date, the record still falls short of the standards required for summary disposition on this claim.[57] Comstock is not entitled to disposition as a matter of law on its defense that the labor classification determinations upon which MnDOT relies were made in violation of Minn. R. 5200.1040 (E).

(3) Unauthorized Rulemaking

Comstock also argues that MnDOT's claims should be dismissed because they are grounded upon wage classification determinations that are not lawful or otherwise enforceable. Comstock asserts that the classification determinations are unpromulgated rules and may not be given effect.

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[55] *In re Space Center Transport*, 444 N.W.2d 575, 581 (Minn. App. 1989) (citing *Motor Vehicle Mfgrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)) (emphasis added).

[56] *See,* Oelker Deposition, at 35-36 and 41-47; *compare also,* Farnham Deposition, Ex. 12.

[57] *Compare, DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) ("We have held … that summary judgment is inappropriate when reasonable persons might draw different conclusions from the evidence presented") (citing *Illinois Farmers Ins. Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978)).

In support of its argument, Comstock points to Ms. Farnham's admission that she relied upon earlier determinations from DOLI for the classifications of laborers, skilled laborers, carpenters, iron workers, sheet metal workers, painters and roofers,[58] and applied these earlier determinations when determining what pay rates were due under the Comstock contract. As Ms. Farnham earlier summarized this process for DOLI Senior Labor Investigator Eric Oelker:

> I included a list of tasks applied to classifications on the Comstock Project for your review. If I have assigned any the classifications inappropriately, I need to know so that I can change them. I based my decisions or assignments on your previous responses to our requests. Each time you send a response, I add what you decide to a running document of classification descriptions since we have nothing formal. It is the only way we can keep track of what tasks are applied to each class.[59]

In Comstock's view, because MnDOT is applying classification determinations from DOLI, across contractors, and giving these determinations future effect, the classification decisions should have been developed through rulemaking.

MnDOT argues that its claim that a particular construction task fits into one of the earlier-announced labor classifications is not rulemaking, but rather case-by-case enforcement of the Prevailing Wage laws. Moreover, MnDOT argues that in carrying out these enforcement duties, it is only logical and reasonable for the Department to be guided by Mr. Oelker's earlier classification decisions.

The Minnesota Administrative Procedure Act defines a "rule" as:

> every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure.[60]

Further, those interpretations of existing rules which "make specific the law enforced or administered by the agency," and are not either long-standing positions of the agency or within the plain meaning of the regulation, are deemed to be "interpretative rules."[61] Like

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[58] Farnham Deposition, at 53-61.

[59] Farnham Deposition, Ex. 30.

[60] Minn. Stat. § 14.02, subd. 4.

[61] *See, e.g., Cable Communications Bd. v. Nor-West Cable Communications P'ship*, 356 N.W.2d 658, 667 (Minn. 1984) ("Generally, if the agency's interpretation of a rule corresponds with its plain meaning, or if the rule is ambiguous and the agency interpretation is a long-standing one, the agency is not deemed to have promulgated a new rule").

substantive rules, an agency's interpretative rules are valid only if they are promulgated in accordance with MAPA.[62]

Equally important in this context is that Executive Branch agencies are granted considerable discretion to decide whether to develop regulatory policy "deductively," by promulgating a new rule, or "inductively," through a series of individual adjudications.[63] The appellate courts have instructed that every executive branch agency – and in the area of labor classifications, DOLI in particular – has the "flexibility and discretion to depart from formal rulemaking" when application of a given legal standard to a particular set of facts seems clear.[64]

The distinctions between rulemaking, on the one hand, and case-by-case determinations, on the other, become still sharper in the light of earlier-decided cases. In *L&D Trucking v. Minnesota Dept. of Transp*.,[65] for example, the Minnesota Court of Appeals considered whether, absent formal rulemaking, MnDOT could seek to apply the provisions of Minn. Stat. § 177.44 in an enforcement action against a particular construction contractor. Minn. Stat. § 177.44 exempts from the reach of the prevailing wage laws the:

> wage rates and hours of employment of laborers or mechanics engaged in the processing or manufacture of materials or products, or to the delivery of materials or products by or for commercial establishments which have a fixed place of business from which they regularly supply the processed or manufactured materials or products.

The appellate panel concluded that it was appropriate for MnDOT, in the context of a specific case, to seek to apply the requirements of this statutory exemption to the facts of a particular contractor's operations. In *L&D Trucking,* this meant applying the statutory requirement that contractors "have a fixed place of business from which they regularly supply the processed or manufactured materials or products," to the facts of L&D Trucking's temporary, transient and very mobile facility for mixing asphalt.[66]

Likewise, in *Reserve Life Insurance Co. v. Commissioner of Commerce*,[67] the Minnesota Court of Appeals held that the Department of Commerce was entitled to

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[62] *See, In re Application of Q Petroleum*, 498 N.W.2d 772, 780 (Minn. App.), *review denied* (Minn. 1993) (*citing, Mapleton Community Home, Inc. v. Minnesota Dep't of Human Services*, 391 N.W.2d 798, 801 (Minn. 1986) and *Minnesota-Dakotas Retail Hardware Ass'n v. State*, 279 N.W.2d 360, 364 (Minn. 1979)).

[63] *See, Bunge Corp. v. Commissioner or Revenue*, 305 N.W.2d 779, 785 (Minn. 1981).

[64] *See, AAA Striping Service Co. v. Minnesota Dep't. of Transp*, 681 N.W.2d 706, 717-18 (Minn. 2004); *compare also, L&D Trucking v. Minnesota Dep't. of Transp*., 600 N.W.2d 734, 736 (Minn. App. 1999); *In re Hibbing Taconite Co*., 431 N.W.2d 885, 894-95 (Minn. App. 1988).

[65] *L&D Trucking, supra*.

[66] *L&D Trucking,* 600 N.W.2d at 737.

[67] 402 N.W.2d 631 (Minn. App.) *review denied* (Minn. 1987).

evaluate particular forms, drafted by insurance carriers, against statutory provisions which prohibit such forms from including terms that are "unlawful, unfair, inequitable, misleading, or encourage[] misrepresentation of the [insurance] policy…."[68] Concluding that the Department of Commerce could apply these statutory prohibitions, on a case-by-case basis, as the draft forms were received by the agency for review, the panel wrote:

> In this case the legislature has given the Commissioner a great deal of discretion under section 61A.02 and 62A.02. The statutes' standards of 'unfair, inequitable, misleading (and) deceptive' necessitate a certain amount of interpretation. It is reasonable for the Commissioner to make such interpretations and decisions on a case-by-case basis. It would be nearly impossible for the Commissioner to apply additional rules in interpretation of these statutes in light of the various situations which arise requiring department evaluation. Because the agency decided the validity of these policies on a case-by-case basis, the rulemaking requirements of the MAPA are inapplicable.[69]

In *Reserve Life Insurance*, notwithstanding the lack of precision in the terms "unfair, inequitable, misleading or encourages misrepresentation," the Commerce Department was intelligibly directed by a statute to confront a distinct type of overreaching by insurance companies.

In *Sa-Ag, Inc. v. Minnesota Dep't of Transp.*,[70] the Court of Appeals considered whether MnDOT's issuance of an addendum to a contract solicitation, which purported to interpret the phase "substantially in place" – as those terms are used in Minnesota's prevailing wage law – amounted to an unpromulgated rule. Finding that the addendum was an agency statement that was generally applicable to a range of different contractors, had an effect as to future bidders on other contracts, and was more than the plain application of the words of the prevailing wage statute, the Court held that rulemaking was required before the announced policy could be implemented.

When read together, *L&D Trucking, Reserve Life Insurance,* and *Sa-Ag, Inc.* stand for two important propositions. First, a case-by-case adjudication seeks to apply an extrinsic source of law (either a statute or a regulation) to the facts of a particular case. Second, if the agency is to establish a more general proposition, not found in existing statutes or regulations, which the agency will apply in future cases, the agency must undertake rulemaking under the MAPA.

In this case, regardless of how MnDOT characterizes its regulatory action, the Department's underlying legal position fails. To the extent that MnDOT seeks to

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[68] *Reserve Life Insurance*, 402 N.W.2d at 633.

[69] *Id*, at 634.

[70] 447 N.W.2d 1 (Minn. App. 1989).

establish, on a "case-by-case basis," that the task of installing Venetian Blinds is properly classified as the work of "Carpenters," it is not availing.

Because MnDOT states that it is proceeding by way of a case-by-case determination, it has limited maneuvering room. In a case-by-case determination, MnDOT must confine itself to the application of existing sources of law.

When one applies the existing sources of law – and in this case, this is the unadorned classification categories in Minnesota Rules[71] – to the particular facts of the MnDOT-Comstock contract, nothing in the term "Carpenters" naturally or plainly suggests that the installation of Venetian Blinds is what these tradesmen necessarily do. The Department's contention does not follow from this classification label any more than it would from the terms "Laborers," or "Painters," or "Sheet Metal Workers" – which are likewise listed in Minn. R. 5200.1100.[72] When the very limited, pre-existing law is applied to the facts of the Detroit Lake project, MnDOT "case-specific" analysis fails.

Further, in all candor, rulemaking is what MnDOT intends here. To the extent that the Department announces that the task of installing Venetian Blinds triggers an obligation for state contractors to pay the then-prevailing wage for carpenters, and maintains this view regardless of whether Comstock undertakes the work, or it is done by some other firm,[73] this is a "rule" that must be developed through MAPA procedures.

Comstock has established that DOLI's past labor classification determinations meet the definition of a rule under Minn. Stat. § 14.02, subd. 4. MnDOT's application of these determinations in assigning classification codes amounts to unauthorized rulemaking. Comstock is entitled to summary disposition upon this defense.

(4) Prevailing Wage Classifications Lack the Required Definiteness

Comstock also asserts that the text of Minn. R. 5200.1040 and 5200.1100 fail to provide sufficient guidance as to which work tasks fall within one or another labor classifications – or how these classifications differ from each other. Comstock argues that without sufficient definiteness, the rules fall below the required constitutional standards. The challenge is two-fold: First, Comstock contends that because violations of the Prevailing Wage laws can result in criminal penalties, the state labor classifications may not be so imprecise that "persons of common intelligence must guess at its meaning or differ as to its application."[74] Secondly, Comstock argues that

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[71] *See,* Minn. R. 5200.1040 (D); 5200.1100 (5) (2007).

[72] *Compare also, The American Heritage Dictionary*, at 242 (2d ed. 1982) ("Carpenter – One whose occupation is constructing, finishing and repairing wooden objects"); Farnham Deposition, at 55 (A carpenter "is one who constructs – who works with wood").

[73] *See,* Finding of Fact 11; Farnham Deposition, Ex. 13.

[74] *See, Hard Times Café, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 171 (Minn. App. 2001) (An ordinance "is void due to vagueness if it defines an act in a manner that encourages arbitrary and discriminatory enforcement, or the law is so indefinite that people must guess at its meaning"); *compare also, State v. Robinson*, 539 N.W.2d 231, 236-37 (Minn. 1995).

the rules are so incomplete that the classification determination process results in decisions that are inconsistent, wholly subjective and arbitrary.[75]

As to whether various labor classifications are sufficiently definite to be knowable by state contractors, Comstock argues that the labor classifications of employees who install chain link fences, lockers and metal panels on construction projects have shifted and changed without warning.[76] Specifically, Comstock asserts that DOLI has at times classified persons who install chain link fences as "Laborers" and at other times, including the Detroit Lakes project, has classified these tradesmen as "Iron Workers."[77] Additionally, Comstock highlights the sworn testimony of both Eric Oelker and Roxanne Farnham to the effect that different people may reasonably disagree as to the appropriate labor classification for particular construction-related tasks.[78]

For its part, MnDOT disputes the characterizations that Comstock makes, but does not take genuine issue with its description of the overall regulatory environment. As to the claimed lack of precision, MnDOT argues that the correct labor classifications for particular tasks were known to Comstock on the date that the underlying contract was signed because Comstock had a listing of the Major Job Classifications, a copy of the contract Statement of Work and – presumably – was a knowledgeable contractor. As the Department's counsel summarized at the oral argument on Comstock's defenses, "any contractor that's capable of doing a 12 million dollar project of this nature, is assumed to have a certain expertise in bidding. They're going to know what different jobs are done by whom and what wage rates apply."[79]

MnDOT disclaims Comstock's further charge of arbitrary enforcement with a bout of genuine candor: The Department asserts that it simply is not possible to charge it with arbitrary enforcement of the labor classification rules, because there are no rules for MnDOT officials to apply. As the Department argues, without a regulatory text to interpret, it cannot be said that the agency has applied this blank slate inconsistently or incorrectly.[80]

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[75] *See, Comstock's Memorandum in Support of Summary Disposition*, at 17-18.

[76] Farnham Deposition at 134, Ex. 19; Oelker Deposition at 73, 77; Groshens Deposition at 14-23; MnDOT Ex. D; Revnew Demonstrative Exhibit 1.

[77] Farnham Deposition at 134, Ex. 19.

[78] Farnham Deposition at 60; Oelker Deposition at 88-89.

[79] *See,* Digital Recording of Oral Argument, OAH Docket No. 8-3001-17706-2 at 1:28 (Jan. 10, 2008); *accord, id.,* at 2:03 ("The task of installing hollow metal door frames was in the contract. The wage rates for the appropriate classifications were in the contract. There is an assumption that the contractor has a minimal level of competency and as part of that they would know generally that different trades, or skills, or titles, or different classifications do certain types of tasks. We believe that was known").

[80] *See, id.*, at 2:00 and 2:12 ("The rules can't be vague and ambiguous when no rules exist. And there are no rules that apply to the assignment of classifications").

Under both the state and federal constitutions, administrative rules must meet certain due process standards of definiteness.[81] A rule is void for vagueness if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or fails to provide sufficient standards for enforcement by executive branch officials.[82] Thus, if a regulation defines an act in a manner that encourages arbitrary enforcement, or is so indefinite that people must guess at its meaning, it is impermissibly vague.[83]

The heavy burden of proving that a regulation is impermissibly vague is upon the party challenging the constitutionality of the regulation.[84] The Minnesota Supreme Court has instructed that a rule "should be upheld unless the terms are so uncertain and indefinite that after exhausting all rules of construction it is impossible to ascertain legislative intent."[85] Stated another way, a regulation is not unconstitutionally vague merely because its terms could have been drafted with greater precision.[86]

Likewise important, in a contested case proceeding, neither an Administrative Law Judge nor the head of an Executive Branch agency may declare a statute or rule "facially unconstitutional." The power to declare a law unconstitutional in all settings is vested with the judicial branch of state government.[87] Yet, it is also true that because Administrative Law Judges and agency heads are charged with ensuring that laws, rules and ordinances are applied in a constitutional manner, it is permissible for these officials to consider whether application of a statute or rule, in a particular factual setting, meets the constitutional standards that have been announced by our courts.[88]

In the view of the Administrative Law Judge, the lack of a reasonably definite set of standards for applying labor classifications falls below the minimum process that is guaranteed to Comstock. Using the example discussed above, no amount of resorting to the rules of construction would permit the ordinary reader to glean from the word "Carpenters" that the task of installing Venetian Blinds is included in that classification.

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[81] *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 107 (Minn. App.), *review denied* (Minn. 1991).

[82] *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *In re N.P.*, 361 N.W.2d 386, 394 (Minn. 1985) *appeal dismissed* 106 S.Ct. 375 (1985).

[83] *See, Hard Times Café, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 171 (Minn. App. 2001); *Humenansky v. Minnesota Bd. of Md. Exam'rs*, 525 N.W.2d 559, 564 (Minn. App. 1994), *review denied* (Minn. 1995).

[84] *See, Essling v. Markman*, 335 N.W.2d 237, 239 (Minn. 1983).

[85] *In re N.P.*, 361 N.W.2d 386, 394 (Minn. 1985).

[86] *Compare generally, State v. Normandale Properties, Inc.,* 420 N.W.2d 259, 262 (Minn. App.), *review denied* (Minn. 1988).

[87] See, *Neeland v. Clearwater Memorial Hosp*., 257 N.W.2d 366, 368 (Minn. 1977); *In the Matter of Rochester Ambulance Serv.*, 500 N.W.2d 495, 499-500 (Minn. App. 1993).

[88] *See,* Conclusion 19, *supra*.

Significantly, the Court of Appeals' decision in *AAA Striping Service Co. v. Minnesota Dep't of Transportation*[89] foreshadowed this exact dispute and is directly on point. In *AAA Striping Service,* the Court addressed the minimum processes that a state contractor might demand as to DOLI's development of prevailing wage classifications. The panel noted:

> To determine whether and to whom DOLI is accountable for decisions not to follow through with rulemaking, we note the importance of classification and the context in which such decisions are made. Workers, labor unions, contractors, subcontractors (including AAA), and perhaps even local units of government, have a substantial interest in the classification process. Fair wages, workers' livelihoods, the financial feasibility of projects, and entrepreneurial opportunities for contractors may be affected by these decisions. The statutes mandate investigation and hearings necessary to define worker classifications. This is strong legislative directive to observe the basics of procedural due process in making classification decisions. We conclude that at a minimum, DOLI should engage in rulemaking as specified in its own regulation, or, in the alternative, make available a reconsideration process with a contested case proceeding when requested by an aggrieved party. . . . To say that the decision to include striper and striper tenders in an existing classification is entirely within the discretion of DOLI, that it can exercise this discretion without a record or a hearing, and that there is no review available is inconsistent with DOLI's own rules, the statutes, and with the principles of procedural due process.[90]

The circumstance decried by the appellate panel is the precisely the one presented here: Not only do the classification categories fail to give a person of ordinary intelligence a reasonable opportunity to know which designations are prohibited, the regulations fail to provide sufficient standards for later enforcement by the agency. Indeed, the only boundary upon Mr. Oelker's determinations as to what tasks fall into

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[89] 681 N.W.2d 706 (Minn. App. 2004).

[90] *AAA Striping Service Co.,* 681 N.W.2d at 717 (emphasis added and citations and footnote omitted). It bears noting that, at different times over the past decade, both the Legislative Auditor and the Minnesota Court of Appeals have urged DOLI to undertake rulemaking to close gaps in the Prevailing Wage Act regulations. *See, Prevailing Wages – Evaluation Report*, at 63 (Office of the Legislative Auditor, 2007) ("The source of the problem is that the rules promulgated by the Department of Labor and Industry do not define the job responsibilities of the various job classes for either commercial or highway/heavy construction. In particular, there is no definition of the responsibilities of common or skilled laborers in comparison to those of skilled tradesmen…. The Department of Labor and Industry should promulgate rules that define the job responsibilities of workers in the various construction job classes listed in the department's rules") (http://www.auditor.leg.state.mn.us/ped/pedrep/prevailingwages.pdf); *L&D Trucking,* 600 N.W.2d at 737 ("This court is not unmindful of the problems that case-by-case enforcement of the prevailing-wage law creates for contractors who want to bid on state highway projects. We therefore encourage formal rulemaking by the Minnesota Department of Labor and Industry or other appropriate agency ….")

which labor classifications, are those that are brought to bear by Mr. Oelker's own conscience. As noted at the oral argument on Comstock's defenses:

> Administrative Law Judge: Is there any boundary on how [Mr. Oelker] puts folks into particular classifications?
>
> MnDOT Counsel: I don't think so. Common sense, experience.
>
> Administrative Law Judge: Can Mr. Oelker pick them out of a hat?
>
> MnDOT Counsel: Realistically, no. Mr. Oelker has been an employee of the agency for 35 years. He's evaluated on a year to year basis. He's considered by the agency to have the appropriate expertise to make these determinations…. He's a state employee and that's his job.
>
> Administrative Law Judge: There isn't any formal boundaries about his….
>
> MnDOT Counsel: There are no rules that apply to this. There are no procedures. There may be some internal procedures, but I don't represent that agency [DOLI] and I'm not aware of any from prior cases.
>
> Administrative Law Judge: I'm just trying to understand what are the constraints, if any…
>
> MnDOT Counsel: There are none that I'm aware of, so theoretically, he could draw them out of a hat. I don't think that's what he's doing.[91]

Lastly, the Department argues that a later evidentiary hearing will "flesh out the process" by which accurate classification determinations could be made by construction contractors, using publicly available documents. Yet, without accompanying affidavits or documents to support this contention, these assurances are merely non-specific pledges to produce evidence at trial. Such promises are insufficient to create a genuine issue of material fact or otherwise forestall summary disposition.[92]

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[91] *See,* Digital Recording of Oral Argument, at 2:00.

[92] *See, Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995). The closest the Department's affidavits come to interposing a disputed issue of material fact as to what the Job Classifications communicate, is the averment that some Carpenters have installed blinds, and that some Iron Workers have tied rebar, during the course of their respective careers in the construction industry. *See, Affidavit of Steve R. Newby*, at ¶¶ 3-6; *Affidavit of Charles E. Witt*, at ¶ 3. These facts, even if true, are not sufficient to dispute Comstock's claim that the classification labels fail to meaningfully communicate what tasks are included.

Because the prevailing wage classification rules do not include sufficient language for readers to determine its intended scope, they may not form the basis for a monetary claim by MnDOT against Comstock.[93] Comstock is entitled to summary disposition on its defenses.[94]

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[93] *See, Dep't. of Labor and Industry v. CBI Na-Con, Inc.,* OAH Docket No. 12-1901-12038-2 (2002) (http://www.oah.state.mn.us/aljBase/190112038.sd.smm.htm) (Because it was not clear whether the Department's definition of "confined spaces" was discretionary, or prohibitive, the Administrative Law Judge found the rule void for vagueness).

[94] While, in the view of the Administrative Law Judge, Comstock is fully entitled to prevail upon its due process defense, the Commissioner may wish, for prudential reasons, not to ground her decision upon any particular reading of the state and federal constitutions. It should be noted that, in like circumstances, the state courts will avoid deciding a case on constitutional grounds when other, non-constitutional bases for the judgment exist. *See, e.g., State v. Bourke,* 718 N.W.2d 922, 926 (Minn. 2006) ("We generally avoid ruling under the constitution if there is another basis upon which a case can be resolved"); *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 732 n.7 (Minn. 2003) ("Our general practice is to avoid a constitutional ruling if there is another basis on which a case can be decided"); *In re Senty-Haugen*, 583 N.W.2d 266, 269 n.3 (Minn. 1998) ("It is well-settled law that courts should not reach constitutional issues if matters can be resolved otherwise").